In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-117

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL NO. 1581, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-18) is reported at 489 F. 2d 635. The Board's decision and order (Pet. App. 19-28) are reported at 196 NLRB 1186.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29-30) was entered on March 13, 1974. A petition for rehearing was denied on April 16, 1974. On July 15, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari until August 14, 1974; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by causing the company to transfer employee Elias Guerra to a less desirable position because he was an alien whose family resided in Mexico, and by maintaining a job referral system based on citizenship and family residence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 37-39.

STATEMENT

Elias Guerra, a Mexican national whose family resided in Mexico, had been employed at the Houston, Texas warehouse of the Manchester Terminal Corporation ("the Company") since 1960 (A. 23-24).[1] Since 1963, Guerra worked in the dock and commodity department (A. 23).

Petitioner ("the Union") is the collective bargaining representative of the Company's employees in both the dock and commodity and the cotton compress and cotton warehouse departments (Pet. App. 19; A. 19).[2] The bylaws

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[1]"A." references are to the appendix to the briefs filed in the court of appeals. The case was tried before the Board on a stipulated record (A. 19-25, 29).

[2]Every job classification in the dock and commodity department had a higher rate of pay than any job classification in the cotton warehouse department (Pet. App. 20; A. 23, 41-44, 49-50). In addition, the hospitalization plan for employees in the dock and commodity department provided coverage for the employee and his family whereas the hospitalization plan for employees in the cotton warehouse department covered only the employee (Pet. App. 20; A. 24-25). However, families residing outside the United States did not qualify for coverage under the hospitalization plan for the dock and commodity department (*ibid.*).

of the Union restrict membership to United States citizens or to those who have declared their intent to become United States citizens (Pet. App. 22; A. 70).

During contract negotiations in 1965, the Union asked the Company to give job preference in the dock and commodity department to United States citizens (Pet. App. 19; A. 19-20), and further requested that Guerra be transferred from that department to the cotton warehouse department because Guerra was not an American citizen and his family lived in Mexico (Pet. App. 20; A. 20). The Company acceded to both requests, and it further agreed to accept job referrals from the Union for the preferred dock and commodity department based on the following priority system: first, persons born in the United States; second, Mexican nationals living in Houston with their families; and third, Mexican nationals whose families lived in Mexico (Pet. App. 19-20; A. 20, 24).

The Union's President told Guerra that he would not be permitted to continue to work as a permanent employee in the dock and commodity department unless he moved his family to the United States or became a United States citizen (Pet. App. 20; A. 21). When Guerra protested his transfer, the Union replied, *inter alia* (A. 74-75):

> It was the feeling of the membership in general that we have no other fellow workers that are not citizens of this country and have no desire to be a citizen or permanent resident of our country; Now, as far as we are concerned, it is their privilege and are in their own rights to do whatever they think is best for them and their families;
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> * * * * *

> We are willing to help and assist you in any possible way that we can to bring your family to the U.S.A. and share with our citizens in the greatness of our beloved country.

Guerra filed an unfair labor practice charge with the Board,[3] which held that the Union violated Section 8(b)(2) and (1)(A) of the Act by requesting and maintaining a job referral system with the Company based on the employees' citizenship and family residence, and by causing the Company to transfer Guerra, an alien whose family resided in Mexico, pursuant to this policy (Pet. App. 22-23).

The Board rejected the Union's contention that it requested Guerra's transfer because it had a policy of maximizing insurance benefits and Guerra's family was not eligible for hospitalization benefits under the Company's plan due to residence outside the United States (see n. 2, *supra*) (Pet. App. 20-21). Rather, the Board found that the Union "discriminated against Guerra because he was a noncitizen who refused to bring his family to this country" (Pet. App. 21). It concluded that "Guerra's citizenship and residence of his family did not provide the Union with legitimate reasons for causing Guerra's transfer," and that discrimination based on such impermissible grounds "'stands as a warning to employees that the favor and goodwill of responsible union officials is to be nur-

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[3]In addition to filing an unfair labor practice charge, Guerra brought a civil action in the United States District Court for the Southern District of Texas alleging violations of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. 1981. *Guerra* v. *Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex.). The district court rejected the Ttile VII claim relying on *Espinoza* v. *Farah Mfg. Co.*, 462 F. 2d 1331 (C.A. 5), affirmed, 414 U.S. 86, but upheld Guerra's claim that 42 U.S.C. 1981 applies to aliens and was violated, the court of appeals affirmed. *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641 (C.A. 5).

tured and sustained'" and thus tends to encourage union membership (Pet. App. 22). The Board further found that the Union, "in requesting and implementing a system of job referrals in which preferences are accorded to persons born in the United States," was in effect allowing "preferences to those eligible for union membership over those not eligible for union membership"; for, "only United States citizens or those who have declared their intent to become United States citizens are eligible for membership in the [Union]" (Pet. App. 22-23).

The Board ordered the Union, *inter alia,* to make Guerra whole for any loss of pay he suffered as the result of the discrimination against him, to notify the Company that it had withdrawn all objections to Guerra's reinstatement as a permanent employee in the Company's dock and commodity department, and to cease maintaining a preferential hiring agreement based on citizenship and family residence (Pet. App. 25-26).

The court of appeals enforced the Board's order (Pet. App. 11-18).

ARGUMENT

The decision below is correct and there is no conflict among the circuits. Further review is therefore unwarranted.

1. Section 8(b)(2) of the Act forbids a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," which, in turn, forbids an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in a labor organization." Two elements must be present in order to establish a violation of Section 8(b)(2): (1) an impermissible discrimination in regard to a term or condition of employment, and (2) a resulting encouragement or discouragement of union membership

or activity. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42-43. The court of appeals correctly concluded that there was substantial evidence to support the Board's findings that both elements were present here.

As the court observed (Pet. App. 14): "Section 8(b)(2) is not concerned solely with situations where the discrimination involved is between union members and nonmembers, or between 'good' members and 'bad, or indifferent' members * * * . It applies where the union has induced the employer to discriminate on the basis of any invidious or arbitrary classification * * * ." This Court has made clear that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (footnotes omitted). Similarly, it is invidious or arbitrary for a union to cause an employee to be discriminated against because he is an alien.[4] Moreover, a demonstration of union power to so discriminate tends to encourage union membership, for it leads nonmembers to believe "that by doing so they will eliminate at lesst one basis for a union delegate or shop steward causing the employer to take arbitrary action against them." *National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172, 183 (C.A. 2), Friendly, J., dissenting.

2. A union violates Section 8(b)(2) of the Act when, under a hiring agreement with an employer, it insists upon preference for its members over non-members. *Local 138,*

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[4]Petitioner contends (Pet. 6) that it had a "legitimate business interest in making distinctions based on family residence and citizenship"—*i.e.*, it desired to restrict employment in the dock and commodity department to employees eligible for family participation in the hospitalization program. However, the court below concluded (Pet. App. 17) that there was substantial evidence to support the Board's finding (Pet. App. 21) that the Union discriminated against Guerra because he was "a noncitizen who refused to bring his family to this country."

International Union of Operating Engineers v. *National Labor Relations Board*, 321 F. 2d 130, 134 (C.A. 2); *National Labor Relations Board* v. *Local 1566, International Longshoremen's Association*, 278 F. 2d 883 (C.A. 3), certiorari denied, 364 U.S. 890. Cf. *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 365 U.S. 667. Such preference is no less unlawful when accomplished by ostensibly objective criteria for referral priority which, in fact, only union members can meet. *National Labor Relations Board* v. *Local 269, International Brotherhood of Electrical Workers*, 357 F. 2d 51, 55-56 (C.A. 3); *International Photographers of the Motion Picture Industries, Local 659*, 197 NLRB 1187, enforced, 477 F. 2d 450 (C.A. D.C.), certiorari denied, 414 U.S. 1157. The Board properly found that the Union, in according employment preferences to citizens, was in effect also discriminating upon the basis of union membership considerations. For, "only United States citizens or those who have declared their intent to become United States citizens are eligible for membership in the [Union]" (Pet. App. 22).

3. Contrary to petitioner's assertion (Pet. 8), immigration policies which restrict the entrance of aliens to this country in order to safeguard the jobs of domestic workers do not provide support for its preference system. Indeed, that system discriminated against those who, like Guerra, had satisfied the requirements of the immigration laws and thus were lawful residents. Petitioner is not aided by *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86. In *Farah* this Court merely held that Title VII of the Civil Rights Act of 1964, which by its terms applies only to discrimination on grounds of race, sex, religion, or ntional orgin (Section 703(a), 42 U.S.C. 2000e-2(a)), does not prohibit discrimination against aliens in private employment. There is no suggestion in this case that the Company would unilaterally have adopted petitioner's preference system, and nothing in *Farah* suggests that a classification based on alienage may be used by a labor organization in a manner which encourages union membership.

CONCLUSION

The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

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[5]There is no reason to hold this case pending disposition of *Hampton* v. *Mow Sun Wong*, certiorari granted, No. 73-1596. *Hampton* involves the constitutionality of a regulation of the Civil Service Commission which bars resident aliens from employment in the federal competitive civil service. As we point out in our petition in *Hampton* (p. 7) "[t]he power to limit alien access to government employment is an incident of national sovereignty * * *" which arises from the special powers of the federal government to regulate the activities of aliens. The federal power is not involved here and the cases are wholly dissimilar.